

MOTION FILED  
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No. 83-5626

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1983

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RONALD CLARK O'BRYAN,  
*Petitioner,*

v.

DAN V. MCKASKLE, ACTING DIRECTOR  
TEXAS DEPARTMENT OF CORRECTIONS,  
*Respondent.*

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On Writ of Certiorari to the United States  
Court of Appeals for the Fifth Circuit

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**MOTION FOR LEAVE TO FILE A BRIEF *AMICUS*  
*CURIAE* IN OPPOSITION TO PETITION FOR A WRIT  
OF CERTIORARI AND BRIEF OF *AMICUS CURIAE*  
WASHINGTON LEGAL FOUNDATION**

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Dated: December 23, 1983

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**MOTION OF THE WASHINGTON LEGAL FOUNDATION  
FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE***

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The Washington Legal Foundation (WLF or Foundation) moves this Court pursuant to Rules 42 and 36 of the Supreme Court Rules for leave to file the annexed brief *amicus curiae* in opposition to the petition for writ of certiorari. Petitioner consents to WLF's participation. Respondent requested the opportunity to review movant's brief prior to deciding whether or not to consent to WLF's participation. Time and printing constraints precluded movant from obliging Respondent's request and movant was unable to contact Respondent's counsel with this information prior to sending its brief to the printer.

The Washington Legal Foundation participated in the instant case as *amicus curiae* before the United States Court of Appeals for the Fifth Circuit. *O'Bryan v. Estelle*, 714 F.2d 365 (5th Cir. 1983). WLF is a non-profit, public interest law firm organized and existing under the laws of the District of Columbia for the purpose of engaging in litigation and the administrative process in matters affecting the broad public interest. The Foundation has offices in Washington, D.C. and Dallas, Texas and has more than 85,000 members and 120,000 supporters throughout the United States whose interests the Foundation represents.

WLF participates in and devotes a substantial portion of its resources to matters raising criminal justice and related constitutional issues. The Foundation's concern for the physical, psychological and financial impact crime has on its victims, their families, and society has led to the establishment of its Crime Victims Program, Death Penalty Project, and Court Watch Project. These programs are designed to advance the rights of crime victims and law-abiding citizens whose interests are too often ignored by the institutions which administer the criminal justice system. Among other activities, WLF provides legal assistance, guidance, and educational materials to the victims of violent crime and their families and participates in court cases which implicate the proper administration of justice.

As part of its Death Penalty Project, WLF has appeared as *amicus curiae* in the following death penalty cases before this Court: *Strickland v. Washington*, No. 82-1554 (U.S. Sup. Ct. 1983); *Barefoot v. Estelle*, — U.S. —, 51 U.S.L.W. 5189 (July 6, 1983); *Enmund v. Florida*, — U.S. —, 102 S. Ct. 3368 (1982); *Zant v. Stephens*, — U.S. —, 102 S. Ct. 1856 (1982); and *Edwards v. Oklahoma*, 455 U.S. 104 (1982). In addition, the Foundation participates in death penalty cases before the United States Courts of Appeals such as *Grigsby v.*

*Mabry*, — F. Supp. — (E.D. Ark. 1983), *appeal docketed*, No. 83-1213 (8th Cir. 1983).

WLF attorneys have also testified before the U.S. Congress on capital punishment issues, *see, e.g., Hearings on H.R. 5679 Regarding A Federal Death Penalty Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary*, 97th Cong., 2d Sess. (1982) (statement of the Washington Legal Foundation), and regularly debate opponents of capital punishment in a variety of public forums.

In the instant case, the Washington Legal Foundation seeks to advance the interests of its members and the public by opposing certiorari in this case. The first three issues raised by Petitioner have been fully and adequately treated below and do not warrant certiorari and plenary consideration here. The fourth issue, proportionality, was not treated by the Fifth Circuit and therefore should not be considered here.

The Foundation believes that review of Petitioner's claims by this Court will unnecessarily delay the administration of justice. WLF can bring to this case a perspective not presently represented. Accordingly, the Foundation respectfully requests permission to file the annexed brief *amicus curiae*.

Respectfully submitted,

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BRIEF OF *AMICUS CURIAE*  
WASHINGTON LEGAL FOUNDATION

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**REASONS FOR DENYING THE WRIT**

**I. THE COURTS BELOW CORRECTLY CONSIDERED  
AND UPHELD THE CONSTITUTIONALITY OF  
THE EXCLUSION OF JURORS WELLS, PFEFFER,  
AND BOWMAN, UNDER THE STANDARDS OF  
*WITHERSPOON v. ILLINOIS***

The courts below correctly considered and upheld the constitutionality of the exclusion of jurors Wells, Pfeffer, and Bowman under the standards articulated by this Court in *Witherspoon v. Illinois*, 391 U.S. 510 (1968). *Witherspoon, supra*, provides that a veniremen may only be excused for cause in capital cases if he is:

irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings.

391 U.S. at 522 n.21. The record in the instant case demonstrates on its face that the excluded veniremen were unalterably opposed to the imposition of capital punishment regardless of the facts and circumstances that might emerge in Petitioner's case. Only repeated *post hoc* dissection of the literal meaning of their statements, combined with a refinement of the *Witherspoon* standard, could lead to a contrary conclusion.

No further judicial dissection of veniremen Wells, Pfeffer, and Bowman's statements is warranted here, however. "[The] decision [below was] at least the fourth time a court has decided that the contested juror exclusions were proper under *Witherspoon*." *O'Bryan v. Estelle*, 714 F.2d 365, 391 (5th Cir. 1983) (Higginbotham, J., specially concurring). Petitioner offers no new evidence or arguments to support granting certiorari. Rather, he merely seeks to have this Court substitute its judgment for that of the other courts which have reviewed his claims.

This Court should decline that invitation. Federal courts have too often substituted their judgment, *ex cathedra*, for that of the State legislature, courts, and juries in capital cases by refining the procedural protections afforded convicted murderers. The instant case demonstrates the problems of administering capital sentences in this country—problems which are destroying public confidence in the criminal justice system. In the eight years since Petitioner cold-bloodedly murdered his son and a jury expressed the conscience of the community by sentencing him to death, he has relitigated the same issues time and again. The State, like Petitioner, is now entitled to due process.

Since Petitioner presents no issues requiring plenary consideration by this Court, further delay will only further undermine the potential for capital punishment to serve the ends of deterrence and retributive justice. The petition for certiorari should be rejected.

**II. SINCE PETITIONER'S "PROPORTIONALITY" CLAIM WAS NOT DECIDED BY THE FIFTH CIRCUIT, IT CANNOT SERVE AS GROUNDS FOR GRANTING CERTIORARI**

Petitioner's contention that the Texas Court of Criminal Appeals failed to conduct a "proportionality review" of his sentence cannot serve as grounds for granting certiorari. The issue was not raised by Petitioner in the courts below. Since Petitioner's "proportionality" claim was neither reviewed nor decided below, no record exists for review of that claim by this Court.

**CONCLUSION**

For the foregoing reasons, the Washington Legal Foundation submits that Petitioner fails to present grounds in support of a grant of certiorari.

Respectfully submitted,

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